

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 November 2006

BALCA Case No.: 2005-INA-00016
ETA Case No.: P2003-NJ-02495957

In the Matter of:

BLESING'S FLOORING COMPANY, INC.,
Employer,

on behalf of

ANDRE LUIZ DE AGUIAR TAVARES,
Alien.

Certifying Officer: Dolores DeHaan
New York, New York

Appearance: Cassandre C. LaMarre, Esquire
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification in the above-captioned matter.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

¹ Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed.

BACKGROUND

Blesing's Flooring, Inc., (Employer) filed an application for labor certification on behalf of Andre Luiz de Aguiar Tavares (Alien) on August 30, 2001 (AF 94-97).² The Employer seeks to employ the Alien as an epoxy floor installer. *Id.*

In a Notice of Findings (NOF) issued June 29, 2004, the CO noted that the Employer's agent, Dulce Cuco of Central Migration, had been convicted of visa fraud. In order to determine the legitimacy of the application, the CO directed the Employer to provide signed statements indicating whether it wished to continue to pursue the application. The CO directed the Employer to verify that all owners of the business authorized the filing of the application. In addition, the CO directed the submission of a signed copy of the Employer's federal tax return for the last two years, and a copy of the Employer's business tax identification number. The CO directed the Employer to submit a complete staffing chart of the business listing each employee by title and job duties, salary, and work schedule. The CO asked whether the owner, employer, or signatory of the ETA 750A form had ever received any payments from the Alien or a representative for the Alien in return for filing this application. The CO also asked for clarification of the business name, since Form 750A exhibited the name "Blesing's Flooring" whereas Form 750B exhibited the name "Blessing Flooring Company, Inc." Finally, the CO noted that correspondence from an attorney had been received, but no G-28 Notice of Entry of Appearance as Attorney had been submitted (AF 83-84).

The Employer submitted rebuttal on July 6, 2004 which included a copy of a G-28 identifying Cassandre C. Lamarre, Esquire, as the Employer's and the Alien's

Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

² In this decision, AF is an abbreviation for Appeal File.

representative (AF 46). A statement dated July 1, 2004 from John Blesing proffered that he is the Employer's owner and that he wished to pursue the application on behalf of the Alien. Mr. Blesing stated that he had signed the form ETA 750A. He stated that he did not receive any payment from the Alien or the Alien's representative for filing the application. Mr. Blesing stated that the name of the business is Blesing's Flooring Company, Inc. (AF 48). In addition, Mr. Blesing submitted a list of employees (AF 49) and the Employer's federal business tax form for 2002 (AF 62-77) and 2003 (AF 50-61).

The CO issued a Final Determination denying the Employer's application for labor certification on August 23, 2004 (AF 42-43). The CO noted that Mr. Blesing submitted unsigned copies of the tax returns. In addition, Mr. Blesing submitted a list of payroll employees, but he did not submit the complete staffing chart of the business, listing each employee by title and job duties, salary, and work schedule. Since the Employer did not submit all documentation required in the NOF, the CO concluded that the Employer had not adequately documented that the job opportunity is bona fide, and that the job opening actually exists and is open to U.S. workers. Based on those findings, the CO denied the application for labor certification.

On August 31, 2004, the Employer requested review by this Board (AF 1). In its request for review, the Employer stated that the business tax forms were not signed because they were copies of the original tax forms which were signed and submitted to IRS. The Employer also submitted handwritten notes indicating the job title for each employee on a copy of the employee list it had provided in rebuttal (AF 11).

DISCUSSION

Under 20 C.F.R. § 656.3, an "employer" is defined as "a person, association, firm or corporation which currently has a location within the United States to which U.S. workers may be referred for employment." When an employer files an application for alien employment certification, it is signifying that it has a bona fide job opportunity that

is open to U.S. workers. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (en banc). The job opportunity must truly exist and be open to any qualified U.S. worker, 20 C.F.R. § 656.20(c)(8), and the burden is on the employer to prove that it is offering a bona fide job opportunity and full-time employment. *See Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (en banc).

In pursuing an application for alien employment certification, an employer must provide information sought by the CO if such information has a direct bearing on the resolution of an issue and is obtainable by reasonable effort. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc). Failure to submit documentation reasonably requested by the CO warrants denial of an employer's application for alien employment certification. *Gencorp, supra*.

In the instant case, the CO was specific in her request for rebuttal documentation to establish the legitimacy of the application, having enumerated and requested specific items of documentation. Such documentation was to include, *inter alia*, a copy of the signed Federal tax return for the business for the last two years, and a complete staffing chart of the business listing each employee by title and job duties, salary and work schedule at the work location at which the position exists.

The Employer's argument on appeal was that it provided unsigned tax returns because it provided the originals to the IRS and only had copies. We take administrative notice, however, that it is possible to obtain copies of filed tax returns from the IRS by filing a Form 4506 and paying a processing fee. The Employer's original attorney was convicted of filing fraudulent labor certification applications, and the CO therefore reasonably directed in the NOF that the Employer provide signed tax returns on rebuttal. In view of the circumstances, the Employer's failure to make any effort to obtain and submit signed copies of its business tax returns is grounds for affirming the denial of certification.

Likewise, the Employer did not provide the CO with a complete staffing chart of the business listing each employee by title and job duties, salary and work schedule at the

work location at which the position exists. Rather, the Employer only provided a list of names of employees. In the request for BALCA review, the Employer hand wrote the titles of the employees on its list of employees. It is well settled that evidence submitted after the issuance of the Final Determination cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (en banc). Thus, the Employer's submission of handwritten notes on the employee list provided with the request for review is not part of the record for consideration on appeal. Even if it was evidence we could consider, it was both untimely and still lacking information about job duties, salary and work schedule.

Both of the documents requested by the CO had a direct bearing on the resolution of the issue of whether the Employer was offering a bona fide job opportunity. Such documentation should have been obtainable with reasonable effort. We find that the Employer's failure to produce the requested documents was an appropriate ground for the denial of certification.

The Employer submitted this application under a request for reduction in recruitment (RIR) processing (AF 110). Generally, when the CO denies an RIR, the case should be remanded to the local job service for regular processing. *See Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003). This panel, however, held in *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004), that an employer who is not able to establish that it can offer a bona fide job opportunity has presented an application that is so fundamentally flawed that it would serve no purpose to remand the case for regular processing. In such a case, the CO may deny the application outright rather than remand for regular processing, even if the case was presented in a RIR posture. Accordingly, we affirm the CO's denial of certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.